NO. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

V.

IRL SHUTTS, ET AL.,

Respondents.

On Petition for Certiorari to the
Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

DAVID CRUMP
Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae,
The Legal Foundation of America

SUSAN CRUMP
Assistant Professor of Law
South Texas College of Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF iv

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 1

I. THE CONFUSED JURISDICTIONAL STATUS OF MULTISTATE CLASS ACTIONS ADVERSELY AFFECTS THE INTERESTS OF CLASS PLAINTIFFS, OF DEFENDANTS, AND OF STATES IN OUR FEDERAL SYSTEM 2

A. *Defendants are currently unable to settle multistate class actions with assurance of binding effect, because many States refuse to give effect to class judgments in the absence of personal jurisdiction* 2

B. *The assertion by Kansas of jurisdiction here is inconsistent with interstate federalism and imposes costs on other States that they might not choose for themselves* 6

II. KANSAS' SUBSTITUTION OF ITS OWN LAW FOR THAT OF OTHER STATES WILL LEAD TO "MAGNET" FORUMS FOR CLASS ACTIONS AND TO FRUSTRATION OF THE POLICIES ADOPTED BY OTHER STATES 9

III. THE KANSAS COURT'S "COMMON FUND" REASONING PARTICULARLY CALLS FOR THIS COURT'S REVIEW 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1932) 10
Dudley v. Amoco Production Co., No. 80-C34 (Dist. Ct. Stevens Cy., Kan., pending) 3
Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983) 11
Erie RR. v. Tompkins, 304 U.S. 64 (1938) 10
Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976) 3
Hansberry v. Lee, 311 U.S. 32 (1940) 6
Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915) 13
In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) 3, 5
In re Northern District of Cal. "Dalkon Shield" IUD Products Liab. Litig., 693 F.2d 847 (9th Cir. 1982) 5
Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 6
International Shoe v. Washington, 326 U.S. 310 (1945) 6, 7
Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan, 631, 629 P.2d 190, *on reh'g*, 230 Kan. 166, 630 P.2d 1129 (1981) 11
Miner v. Gillette Co., 87 Ill.2d, 428 N.E.2d 478 (1981) 2, 7, 8
Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) 11
Rush v. Savchuk, 444 U.S. 320 (1980) 6
Shaffer v. Heitner, 433 U.S. 186 (1977) 6
Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977) 12
World-Wide Volkswagen Corporation v. Woodsen, 444 U.S. 286 (1980) 6

STATUTES

Uniform Class Actions Act sec. 6 9
North Dakota Rules of Civil Procedure 23(f) 9
Oklahoma Stat. Ann. Tit. 12, sec. 14 9

SECONDARY

Brief of Amicus Curiae on behalf of Plaintiffs, "Dalkon Shield" IUD Products Liability, Gillette Company v. Miner, No. 81-1493 (U.S.S. Ct. 1982) 5
Brief of Federal Energy Regulatory Commission, Mesa Petroleum Co. v. Kansas Power & Light Co., No. 81-711 (U.S.S.Ct. 1981) 11
Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, No. 82-461 (U.S.S.Ct. 1983) 4, 12, 13
Comment, *State Court Jurisdiction Over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette*, 69 IOWA L. REV. 795 (1984) passim
Fisch, *Notice, Costs, and the Effect of Judgments in Missouri's New Common-Question Class Action*, 38 MO. L. REV. 173 (1973) 5
Miller, *Problems in Giving Notice in Class Actions*, 58 F.R.D. 313 (1972) 5
Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L. J. 1411 (1974) 2
Note, *Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty*, 31 DE PAUL L. REV. 471 (1982) 2
Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979) 2, 8
Note, *Personal Jurisdiction and Multistate Class Actions: The Impact of World-Wide Volkswagon v. Woodson*, 32 DRAKE L. REV. 441 (1983) 5
Note, *Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions*, 56 TEXAS L. REV. 1033 (1978) 2
Note, 71 ILL. B. J. 184 (1982) 3
Ross, *Multistate Consumer Class Actions in Illinois*, 57 CHI-KENT L. REV. 397 (1981) 3
R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977) 7
Scher, *Uniform Class Actions: A Critical View*, 63 A.B.A. J. 840 (1977) 9

NO. 84-233

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

V.

IRL SHUTTS, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. *Identification of Amicus Curiae.* The Legal Foundation of America is a nonprofit corporation supporting the operations of a tax exempt, public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston, and it shares certain personnel and activities with the law school. Its goals include the reasonable construction of regulation and preservation of the values of federalism. In support of these goals, LFA has appeared in this honorable Supreme Court, in the federal courts of appeals, in the federal district courts, and in the courts of the several states.* .

---

* In some cases, as here, LFA has appeared in its own name. In other such cases, LFA attorneys have served as counsel of record to amici interested in regulatory or federalism issues, including States, local governments, professional or trade associations, and others.

2. *Position of LFA as Amicus Curiae.* Kansas has here combined the removal of jurisdictional limitations with the forum's choice of its own law in such a way as to countermand the regulatory policies of other States. The Kansas decision raises substantial questions of both due process and interstate federalism.

3. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance, and this Court is the only forum that can effectively resolve it. The academic resources available to amicus curiae because of its law school location may enable amicus curiae to contribute to understanding of the jurisdiction and choice of law issues. Further, amicus curiae is familiar with the public policy of Texas as compared with that of Kansas in the substantive area in question and may be able to assist the court in fully developing the issues.

4. *Avoidance of Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid duplication. This brief concentrates upon issues that are not otherwise raised.

5. *Reasons for Believing That Existing Briefs May Not Present All Issues.* Though the Petition for Certiorari is clearly well drafted, the complexity of the issues makes it unlikely that any one party can brief them fully. There is need for other views to show the full impact of the decision of the Kansas Supreme Court. For example, most class actions are settled owing to the cost of such litigation, and this brief considers the effect of the decision below on such settlement. Further, the decisions of this Court emphasize the importance of jurisdictional limitations as means of ensuring "that the states . . . do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system," *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1982), and this brief deals with that interstate federalism issue. The brief also covers the probability that the choice of law approach adopted below will create "magnet forums" in class actions and frustration of state policy that could result. These issues are not otherwise presented as they are presented here.

6. Consent of Parties, or Requests Therefor. The Consent of Petitioner has been requested and received. The consent of Respondents Shutts et al. has been requested and refused.

For these reasons, LFA requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

David Crump
Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae

NO. 84-233

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

V.

IRL SHUTTS, ET AL.,
Respondents.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1-3 of the Motion preceding this Brief as showing the interest of Amicus Curiae.

REASONS FOR GRANTING THE WRIT

The case at bar presents substantial questions of due process and interstate federalism. The Kansas Supreme Court correctly treated the class action in this case as a regulatory device. [1] But what the Kansas court did not acknowledge is that different jurisdictions may wish to take different approaches to both class

---

1 For example, the Kansas court mentioned Kansas' interest in regulating the conduct of oil and gas producers within the territorial confines of Kansas. Appendix A28. In fact, class actions are just as effectively a type of regulatory control over the conduct of business as regulation by a consumer protection agency or oil and gas board.

actions and regulatory schemes and may attempt to diminish harmful and costly effects attributable to regulation itself.

I. THE CONFUSED JURISDICTIONAL STATUS OF MULTISTATE CLASS ACTIONS ADVERSELY AFFECTS THE INTERESTS OF CLASS PLAINTIFFS, OF DEFENDANTS, AND OF STATES IN OUR FEDERAL SYSTEM.

A. Defendants are currently unable to settle multistate class actions with assurance of binding effect, because many States refuse to give effect to class judgments in the absence of personal jurisdiction.

A defendant has the right to know whether the adjudication that will end class litigation will be binding. At present, this assurance is simply unavailable in multistate class actions.[2] There are several States whose decisions indicate that they will not give full faith and credit to class action judgments unsupported by personal jurisdiction.[3]

The defendant is particularly likely to be subjected to a "heads I win, tails you lose" approach in these circumstances. If defendant prevails in a class action in a given State, there is no assurance that nonresident class "members" will not relitigate in their home forums, and no reason to assume that their arguments that they were not subject to the jurisdiction of the foreign court will not be sympathetically received after a plaintiff class loss or low recovery.[4] These concerns are particularly important if a defendant desires to accept a settlement overture. A defendant settling a multistate class action—and it is to be remembered that a high percentage of class actions settle, because of the enormous cost and uncertainty that they impose upon both sides—does not have the ability to buy its peace.[5] This discouragement of settlement is one of the least attractive features of the decision below.

There may be even greater concern, however, for the abuses of regulation by class action than for abuses of other kinds of regulation. Any attorney, whether responsive to state policy or not, has the ability to bring a class action entailing enormous litigation costs without regulatory supervision over the decision to cause those costs. See note 19 infra.

2 Scholarly theories are diverse and inconsistent, and there is a substantial literature on the subject. See, e.g., Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718 (1979); Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 HASTINGS L.J. 1411 (1974); Comment, State Court Jurisdiction over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette, 69 IOWA L. REV. 795 (1984); Note, Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 TEXAS L. REV. 1033 (1978). Numerous other articles and notes are cited in these works.

In Illinois, some commentary has been harshly critical of Miner v. Gillette Co., 87 Ill.2d 7, 428 N.E.2d 478 (1981). See Note, Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty, 31 DEPAUL L. REV. 471, 496 (1982) (". . . the Miner opinion invites an onslaught of trivial suits to be filed in Illinois, suits that the state will have little reason to consider"), cf. Note, 71 ILL. B.J. 184 (1982). One article favorable to the decision was written by a member of the firm that served as plaintiff's class counsel. Ross, Multistate Consumer Class Actions in Illinois, 57 CHI-KENT L. REV. 397 (1981).

3 For example, Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), and Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976), conflict with Shutts and Miner. See Petition for Certiorari at 9-11.

4 The Kansas Court did not consider the viability of multiple overlapping national class actions, in which two or more States attempt to adjudicate the same claimants' rights. See, e.g., in re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (involving overlapping class certifications). The decision below enhances the likelihood of such conflicts without providing guidance as to their resolution.

5 In fact, Amoco Producing Company actually made an effort here to settle possible obligations by making payments of interest in amounts it determined were lawful in each respective State. It was nevertheless subjected to a Kansas class action parallel to that against Phillips, seeking more interest. Dudley v. Amoco Production Co.,

The response of plaintiff Shutts, in this case, to these arguments has uniformly been that Phillips should "pay" and avoid the "worry." [6] There is reasonable and genuine basis for dispute, however, as to both liability and damages. Shutts' arguments have involved the unprecedented abrogation of contractual provisions and the overriding of directly applicable Texas law, and a defendant faced with the demand that it "pay" in such a situation to avoid the "worry" is in a difficult position. [7] Furthermore, Shutts overlooks the need for a principled rule of general application, governing not only this case but all cases, and functioning workably in an interstate federal system.

Finally, the rights of putative class members are at issue. These rights can be appreciated by considering a class action in which defendant prevails and judgment is rendered that claimants take nothing. Class claimants may then be in need of personal jurisdiction principles similar to those protecting defendants, [8]

No. 80-C-34 (Dist. Ct. Stevens Cy., Kan., pending). The possibility that a good faith settling defendant may be subjected to such treatment is very real, and the lack of assurance to the contrary may cause a defendant to regard as unwise a settlement offer that it would otherwise accept.

6 See, e.g., Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, No. 82-461 (U.S. S.Ct. 1983), at 6 (arguing that, "If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry"). This argument misconceives the issue.

7 See note 5 supra.

8 Indeed, a class may be composed of defendants. The test for due process adopted by the Kansas court, recognizing only notice and representation as requisites of due process, would be equally applicable to a defendant class. The Kansas Court's reasoning thus supports removal of jurisdictional requirements for defendants just as it does for plaintiffs.

Nonresident class members are actually in a position analogous to that of defendants in that they may lose their rights involuntarily. See Comment, supra note 2, 69 IOWA L. REV. at 806.

because they face the cutoff of their rights by res adjudicata. [9] Shutts has argued that these concerns lack merit, but plaintiffs have themselves objected to class certification in some cases. For example, the Dalkon Shield plaintiffs [10] actually appeared in this Court in *Gillette Company v. Miner* [11] to oppose the plaintiff's argument on the ground that certification, in their case, would benefit the defendant [12] in a way unfair to the class. [13]

---

9 Disposing of nonresidents' rights may be appropriate if they have intelligently and voluntarily submitted themselves to the jurisdiction of the court, for better or for worse. There are several reasons, however, that such consent cannot be inferred from the mere fact of notice in multistate class actions.

First, a court lacking power to compel appearance has no authority to compel a nonresident to opt in or opt out. See Fisch, Notice, Costs, and the Effect of Judgments in Missouri's New Common-Question Class Action, 38 MO. L. REV. 173, 212 (1973); Comment, supra note 2, 69 IOWA L. REV. at 800; Note, Personal Jurisdiction and Multistate Class Actions: The Impact of World-Wide Volkswagen v. Woodson, 32 DRAKE L. REV. 441, 459 n. 133 (1983). Absence of power to force appearance is logically inconsistent with power to force a binding choice by the filing of a paper with the court. Secondly, class notices are not comparable in effectiveness to service of process. They are notoriously poorly understood. See Miller, Problems in Giving Notice in Class Actions, 58 F.R.D. 313, 322 (1972); Comment, supra, at 800 n. 41. Third, class notices are often written so as to mislead. Finally, every class action, including the present one, necessarily involves limits on the right to opt out, and such restrictions limit the voluntariness of submission. See Comment, supra, at 800 n. 41.

10 In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

11 Brief of Amicus Curiae on behalf of Plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation, Gillette Company v. Miner, No. 81-1493 (U.S. S. Ct. 1982).

12 A similar argument was made in opposition to certification by plaintiffs in In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982). Dalkon Shield and Skywalk involved mandatory class actions and thus present slightly different issues; in both cases, however, the trial court had found notice and representation sufficient

B. The assertion by Kansas of jurisdiction here is inconsistent with interstate federalism and imposes costs on other States that they might not choose for themselves.

Amicus acknowledges that, in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee,* [14] this Court subordinated the interstate federalism aspect of personal jurisdiction to the individual liberty interests of parties. However, in *World-Wide Volkswagen Corporation v. Woodson,* [15] the Court had, shortly earlier, said the following:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigation in a distant or inconvenient forum. *And it acts to ensure that the States, through the courts, do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system.*

At best, the status of this interstate federalism interest in the multistate class action is confused.

An example of the conflict in State policies regarding class actions may be found in *Miner v. Gillette Company,* [16] in which this Court granted certiorari but later dismissed for lack of finality. Gillette gave away hundreds of thousands of free items in a promotional effort but underestimated demand. It offered a refund and substitute to the remainder of applicants. The class complaint charged that this ostensibly innocent conduct constituted a deceptive concealment by Gillette of the fact that it did not have sufficient merchandise to give to all who asked.

There are two ways to regard such a claim, either of which might be subscribed to by a conscientious state government. The Supreme Court of Illinois regarded the class action in question as a valuable regulatory protection for consumers. Another reasonable view, however, is that the action in *Miner v. Gillette Company* represented a kind of regulation that could raise costs for all consumers (both in Illinois and in every other State) disproportionately to its putative benefits. A State other than Illinois might conclude that the labelling of apparently innocuous conduct as deceptive[17] reduces the availability of goods and services,[18]

---

to satisfy due process.

In both mandatory and voluntary class actions, defendants may be free to unfairly influence the choice of forum if multistate class jurisdiction is allowed without nexus or contacts. Such was precisely the complaint of plaintiffs in the Dalkon Shield and Skywalk cases.

13 The Kansas Court's reliance on Hansberry v. Lee, 311 U.S. 32 (1940), is misplaced for three reasons. First, the ambiguous reference to those "not within the jurisdiction" is most logically read as referring to those physically outside the state. It is less reasonable to consider this offhand remark as a major break with past jurisdictional concerns. Secondly, the phrase is dictum, because the class members in Hansberry were all residents. Third, Hansberry was decided in another constitutional era, before International Shoe v. Washington, 326 U.S. 310 (1945), and long before Shaffer v. Heitner, 433 U.S. 186 (1977) or Rush v. Savchuk, 444 U.S. 320 (1980).

14 456 U.S. 694, 702-03 n. 10 (1982).

15 444 U.S. 286, 291-92 (1980) (emphasis added). The Court concluded that the jurisdictional limit of due process was "an instrument of interstate federalism" protecting the "orderly administration of the laws" of other States. Id. at 294, quoting International Shoe v. Washington, 326 U.S. 310, 317 (1945).

16 87 Ill.2d 7, 428 N.E.2d 478 (1981).

17 A State might also conclude that the labelling of apparently honest conduct as deceptive trivializes the law and results in oppression. Cf. Comment, supra note 2, 69 IOWA L. REV. at 810.

18 Cf. R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (2d ed. 1977).

because producers must protect themselves from unpredictable liability. The ease of blackmail,[19] disproportionate enrichment of class counsel, and inevitable frustration of state policy that results from even conscientious efforts to adjudicate fifty sets of complex state laws,[19a] might be further concerns to such a State. Particularly when, as in *Gillette*, there was no monetary loss to any consumer, and potential recoveries were only a few dollars, a thoughtful state citizenry might choose to avoid encouraging multistate class actions such as those certified by Kansas and Illinois, as a means of protecting itself from the costs and disadvantages of such actions.

Indeed, it is arguable that the majority of States have already made this choice by declining to adopt proposed legislation that would sanction multistate class actions on a reciprocal basis. The Uniform Class Actions Act [20] provides two means by which a

---

19 Id. at 474. A class action "places the lawyer in [a position that] relieves him of accountability, which is bad, because his private goal diverges from the social goal of obtaining a judgment equal to the social costs of the violation." Id. at 450.

19a It is unlikely, for example, that a local state court will have ready access to statutory and decisional law of all fifty states. It is equally unlikely that all counsel will. The removal of decisional law from its procedural context and the complexity of the kinds of consumer and energy laws at issue make appropriate understanding of all fifty jurisdictions' laws unlikely, not to mention the possibility of the forum's disregard of those laws, as in the present case. See Note, 92 HARVARD L. REV., supra note 2, at 734; Comment, 69 IOWA L. REV., supra note 2, at 804 (concluding that "the usual risks involved in interpreting unfamiliar laws increase exponentially in a nationwide class action").

20 UNIFORM CLASS ACTIONS ACT sec. 6 provides:

(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists or would exist in a suit against the person under the law of this State [or]

(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.

court can obtain jurisdiction over a class of multistate plaintiffs: (1) by the presence of minimum contacts or (2) by a reciprocal recognition of the binding effect (i.e., by a State's consenting to have its citizens bound by class actions elsewhere). The Uniform Act respects interstate federalism concerns, and it is notable that it would require minimum contacts here. Texas, Oklahoma, and the majority of States have declined to adopt the reciprocal provisions of the Act.[21] Even upon full consideration, they might decide not[22] to adopt them, if they concluded that their citizens' interests would be better served by a narrower class action approach entailing lower regulatory costs and fewer disadvantages. Kansas and Illinois have countermanded this choice.

II. KANSAS' SUBSTITUTION OF ITS OWN LAW FOR THAT OF OTHER STATES WILL LEAD TO "MAGNET" FORUMS FOR CLASS ACTIONS AND TO FRUSTRATION OF THE POLICIES ADOPTED BY OTHER STATES.

The Kansas court avoided some of the conflict of laws questions faced in *Miner v. Gillette Company* by the expedient of countermanding the Constitutions, legislation, and court decisions of Texas and Oklahoma. Kansas made clear that it will apply its own law in derogation of that of a different State even if the interests of the other State are more significant and even if the transaction took place in the other State between citizens

---

(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.

21 Only North Dakota has adopted the reciprocal feature of the Uniform Act. See N.D. R. CIV. P. 23(f).

22 Cf. Scher, Uniform Class Actions: A Critical View, 63 A.B.A.J. 840 (1977). Oklahoma has continued to require opt-in and has thus expressed its preference to confine class litigation more narrowly. Okla. Stat. Ann. Tit. 12, sec. 14.

of the other State. [23]

As the Kansas court appeared to recognize,[24] this holding creates the danger that resort to "magnet" forums may defeat the chosen substantive policy of other States. If other States were to adopt a similar approach, plaintiffs' attorney would be able in every class action to identify a "best" plaintiffs' forum. This magnet jurisdiction would be the State that would be most likely, among the fifty States of the union, to hold against the defendant, or the one that would award maximum damages.[25] Such a forum would ignore laws that would produce a defendant's judgment or a lower recovery. The frustration of the substantive regulatory choices made in the respective regulatory commissions, legislatures, or courts of other States would naturally follow. The effect would be similar to, but more direct, than that condemned by this Court in the famous case of *Erie RR. v. Tompkins.*[26]

---

23 Only if it is convinced that reasons to the contrary are "compelling" would Kansas do otherwise. Appendix A43.

24 "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system." Appendix A24.

25 Ironically, the Kansas court applied Kansas law in part because "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." Appendix A43. In this, the court missed the point.

It was no accident that the action was filed in a forum in which the forum's law was adverse to the defendant to the maximum degree. Under these circumstances, it is not surprising that plaintiffs "desired" that law to apply. The question remained whether such application was consistent with the defendant's rights, a question the Kansas Court did not deem necessary to consider. Id. at A42-A43.

26 304 U.S. 64 (1938). The Erie Court emphasized the frustration of state policy resulting from substitution of law preferred by the forum, and it cited Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1932) to that effect. Precisely the same kind of frustration, as well as the same

In the present case, for example, Texas has strong interests in the relationship between oil and gas producers and royalty owners. This Legal Foundation has appeared in natural gas cases arising from both Texas and Kansas and would respectfully state to the Court that the jurisprudence of the two States differs dramatically. Kansas, in fact, is a maverick jurisdiction in oil and gas matters,[27] probably because a portion of the State produces oil and gas but a larger and politically more powerful segment does not. Kansas' attitude toward producers has resulted in Kansas Supreme Court decisions that have been attacked by the Federal Energy Regulatory Commission in this Court on federalism grounds.[28]

Interest on suspense royalties is a case in point. The ability to suspend royalty is absolutely essential, since loss of the lease may follow even inadvertent underpayment and since lawful rates are frequently uncertain. The producer is often in the situation in which gas purchasers claim that he is overcharging and royalty owners claim that he is underpaying, and suspension of payment pending determination is the only way to assure against multiple liability. Respondent Shutts, reflecting the Kansas attitude, describes suspension as "wrongful."[29] But to the State of Texas, which protects the right to suspend and would require a non-punitive approach to interest, the Kansas approach seems

---

kind of forum shopping and discrimination as were concerns in Erie, would result from the Kansas Court's decision here.

27 For example, Kansas is one of very few jurisdictions that have enacted intrastate price controls lower than those that would be administered by the Federal Energy Regulatory Commission. See Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983). Kansas has interpreted its law together with federal law so as to abrogate agreed pricing terms on gas sold in Kansas. Compare Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan. 631, 629 P.2d 190, on rehearing, 230 Kan. 166, 630 P.2d 1129 (1981) with Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) (affirming contrary conclusion by FERC). Other examples are to be found in the Petition for Certiorari.

28 Brief of Federal Energy Regulatory Commission, Mesa Petroleum Co. v. Kansas Power & Light Co., No. 81-711 (U.S.S.Ct. 1981).

calculated to discourage production. Furthermore, agreement on interest treatment of suspense royalties is a common and appropriate feature of oil and gas leases, but the Kansas court here nullified such agreements, even if made in Texas by Texas citizens. The Kansas approach amounts to imposition of higher energy costs on each of the other States, favors narrow interests of Kansas citizens, and might be opposed by Texas and Oklahoma as not leading to the best climate for oil and gas production in the long term.

The point is not whether Kansas or Texas law is "better" policy. It is that this frustration of other States' policy is an inevitable feature of Kansas' choice of law approach. Furthermore, if the Kansas approach were generally adopted throughout the nation, it would create a magnet forum for every class action.

III. THE KANSAS COURT'S "COMMON FUND" REASONING PARTICULARLY CALLS FOR THIS COURT'S REVIEW.

The Kansas court's effort to support its decision by "common fund" reasoning[30] particularly calls for this Court's review. This action for damages[31] does not in any respect resemble the common fund cases,[32] and indeed the difficulty with the Kansas

---

29 Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, 103 S.Ct. 725 (1983) (Shutts II), at 14, citing Shutts v. Phillips Petroleum Co., 222 Kan. 527, 552-53, 567 P.2d 1292 (1977) (Shutts I) (calling the possession of moneys by suspension "wrongful").

30 The Kansas court used this reasoning to support both its jurisdictional conclusions and its choice of Kansas law. Appendix A12, A43.

31 The Kansas court expressly held that the action "is one for damages." Appendix A44. This conclusion would contradict the "common fund" conclusion even if there were no other reasons against it. See note 32 infra.

32 This Court's common fund cases are based on the rationale that if there is an identifiable, exhaustible res, which might be made the

court's reasoning is that it is equally applicable to every class action.[33] It would authorize a magnet forum to ignore jurisdictional and choice of law concerns in virtually every such case.

CONCLUSION

Both the class action jurisdiction question and the choice of law approach adopted by Kansas present substantial questions that should be decided by this Court.

---

subject of inconsistent adjudications, it is appropriate to adjudicate all claims affecting the res in one proceeding, where the res is located. A common fund is like a single fixed pie against which there are claims by persons so related that, if their claims were differently adjudicated, the results would be inconsistent. For example, in Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), the Court concluded that an insurer's safety fund, made of contributions, was necessarily treated as a unit because "[t]he fund was single . . . . It would have been destructive of [policyholder's] mutual rights to use the mortuary fund in one way . . . in one state, and to use it in another way . . . in another state." Id. at 670-71.

No such situation exists here. There would be no inconsistency if some claimants received one amount and others received whatever other amount, if any, might be due them; in particular, there would be no inconsistency if Texas claimants' claims were adjudicated in Texas under Texas law. There is, further, no reason for supposing that their claims must be paid from a "fund" located in Kansas. Petitioner Phillips' characterization of this reasoning as judicial "alchemy" is justified.

33 The Kansas court's reasoning was based in large part upon the fact that the claims are similar. But common issues are a requisite of every class action. The court buttressed its conclusion by the argument that defendant did not segregate damages in advance in its accounting and that the defendant did business in the State. These conditions too may be expected in virtually every multistate class action.

Respectfully submitted,

David Crump
Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae